"What they [i.e. the words 'if unrebutted'] mean is that for the purpose of reaching the decision called for by section 188(1) the court must act on the presumptions (a) that all such evidence of primary fact [elicited during the case for the prosecution] is true, unless it is inherently so incredible that no reasonable person would accept it as being true; and (b) that there will be nothing to displace those inferences ... in the absence of any further explanation. Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness, whether called for the prosecution or the defence, until after all the evidence tendered in the case on behalf of either side has been heard and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses."

Then Lord Diplock went on to contrast this with the attitude of the court in a trial with a jury, in the course of which His Lordship said that if there is *some* evidence which, *if it were to be accepted by the jury as accurate,* would establish each essential ingredient in the alleged offence, the judge must let the case go on and not direct the jury to acquit and discharge. His Lordship said at pages 51 and 52;

"The proper attitude of mind that the decider of fact ought to adopt towards the prosecution's evidence at the conclusion of the prosecution's case is most easily identified by considering a criminal trial before a judge and jury, such as occurs in England and occurred in Singapore until its final abolition in 1969. Here the decision-making function is divided; questions of law are for the judge, questions of facts are for the jury. It is well established that in a jury trial at the conclusion of the prosecution's case it is the judge's function to decide for himself whether evidence has been adduced which *if it were to be accepted by the jury as accurate,* would establish each essential element in the alleged offence: for what are the essential elements in any criminal offence is a question of law. If there is no evidence (or only evidence that is so inherently incredible that no reasonable person could accept it as being true) to prove one or more of those essential elements, it is the judge's duty to direct an acquittal, for it is only upon evidence that juries are entitled to convict; but if there is *some* evidence, the judge must let the case go on ..... On the question of the accuracy of the evidence of any witness jurors would be instructed that it was their duty to suspend judgment until all the evidence of fact that either party wished to put before the court had been presented. Then and then only should they direct their minds to the question whether the guilt of the accused had been proved beyond reasonable doubt."

Here there was evidence that Mr. Lum is a person of good education and considerable experience with firearms and in determining whether a particular bullet had gone through the barrel of a particular rifle; and, applying the test laid down by the Privy Council in *Haw Tua Tau (supra),* the learned Judge should have let the case go on and not direct the jury to return a verdict of not guilty.

Finally there remains the question whether or not we should order a retrial. When during Shaikh Daud's reply it was pointed out to him that the alleged offence took place in July 1978 four years ago and owing to the considerable delay it might not be just to order a retrial, he said that he would leave that question to the court, being more interested in the court ruling whether or not the learned trial judge was right in deciding that Mr. Lum was not an expert.

We have examined the record with care and find that the case against the accused is not strong, being dependent on rather thin circumstantial evidence, and had the learned Judge directed his mind to this alone he would have been justified in applying section 214(i) of the Criminal Procedure Code, and in view of this we decline to order a retrial.

*Appeal dismissed.*

Solicitors: *Au Ah Wah & Co.*

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## PUBLIC PROSECUTOR v. LING TEE HUAH

**[A. Cr. J. (Yusoff Mohamed J.) March 3, 1980]**
**[Sibu – Criminal Appeal No. K. 2 of 1980]**

*Criminal Law & Procedure – Corruption – Bribery offered – Use of trap witness – Whether there was sufficient corroboration – Prevention of Corruption Act 1961, s. 14.*

*Criminal Law & Procedure – Corruption – Investigation by police inspector against senior officer – Nothing in Prevention of Corruption Act 1961 preventing it.*

This was an appeal against the decision of the learned magistrate who acquitted the accused of the charge under section 4(b) of the Prevention of Corruption Act, 1961.

In the course of investigation the accused was alleged to have offered PW1 a bribe of $2,000 and a plan was devised to trap him. This occurred on June 23 at a hotel at which place the accused had handed an envelope containing $500 as part payment to PW1. The accused was arrested as soon as he appeared at the hotel lobby.

The learned magistrate found that PW1 was a trap witness and because there was no corroboration he acquitted the accused without calling for his defence.

**Held,** allowing the appeal:

(1) corroborative evidence need not be direct. It is sufficient if it is merely circumstantial evidence of the accused's connection with the offence;

(2) in law there is nothing to prevent a police inspector to institute investigation into a crime involving

his senior officers under the Prevention of Corruption Act 1961, especially when he was under the direction of his O.C.C.I.;

(3) the accused's defence was one of denial. A mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient;

(4) a magistrate is entitled to believe a witness at a trial but a general reference to the demeanour of witnesses without more, gives rise to suspicion that an attempt is being made to bolster up a verdict which is contrary not only to the weight of the evidence but to the probabilities and which could not be supported on a detailed examination of the evidence;

(5) in this case the learned magistrate had obstinately blundered and misdirected himself on many aspects of the evidence before him which led him to reach a distorted conclusion as to produce a positive miscarriage of justice.

*Cases referred to:–*

(1) *Mohamed Taufik* v. *Public Prosecutor* [1975] 1 M.L.J. 36
(2) *Public Prosecutor* v. *Datuk Harun Idris (No.2)* [1977] 1 M.L.J. 15 @19.
(3) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 89.
(4) *R.* v. *Low Toh Cheng* [1941] M.L.J. 1.
(5) *Yap Fook Yew & Anor.* v. *Public Prosecutor* [1949] M.L.J. Supp. 3.

CRIMINAL APPEAL.

*Abdul Khalid bin Abdul Manaff* (Deputy Public Prosecutor) for the appellant.

*David Tiong* for the respondent.

*Cur. Adv. Vult.*

**Yusoff Mohamed J.**: This is an appeal against the decision of Stipendiary Magistrate at Sibu, upon his acquittal of the accused charged under section 4(b) of the Prevention of Corruption Act, 1961.

The facts are these:

Acting under the direction of his OCCI, one Inspector Michael Lee (PW1) carried out an investigation on an allegation of corruption against a senior police officer. In carrying out this duty PW1 was supervised by a Divisional Superintendent of Police (PW2). The investigation involved the accused who was suspected of running an illegal four-digits lottery although he had a licence to sell legal lottery tickets as well.

In the course of investigation PW1 met the accused four times beginning from June 17, 1976 in order to record his statement. On 18th of June while recording the accused's statement at his (accused's) house PW1 said that the accused offered to pay him $2000.00 a month for a period of one year, which he refused. On returning to the police station he reported the incident to PW2. On June 19, when continuing to record the accused's statement at the same place, the accused again asked him whether he would accept the offer. PW1 said that he again declined. This matter was also reported to PW2.

Following this offer, the matter was referred to the NBI officer (PW3) who requested to be informed when accused was contacted again. On 23rd of June the accused was to meet PW1 at the Bamboo Coffee House of Premier Hotel Sibu, at about 5.00 p.m. PW1 informed the NBI officer at 4.30 p.m. and a trap was planned. PW1 was searched at the NBI's office to see that he carried no money with him except enough to pay for his drinks and thereafter he left for the Coffee House. On arrival there he was met by accused. After having had their drinks PW1 said the accused handed him an envelope saying that it contained $500.00 as part payment. PW1 accepted it and as had been arranged followed accused out from the Coffee House indicating that money had been passed. When they came to the lobby of the Hotel PW3 arrested the accused in the presence of PW1.

On this evidence the learned magistrate found that PW1 was a trap witness and because there was no corroboration, he acquitted the accused without calling for his defence. Following an appeal the learned magistrate was ordered to call for the defence of the accused and having done so, he again acquitted the accused on similar grounds he held before. This is the second appeal.

In his grounds of decision the learned magistrate referred to Abdul Hamid J.'s decision (as he then was) in *Mohd. Taufik* v. *Public Prosecutor*[1] in that when considering the evidence of a trap witness, the trial magistrate should warn himself of the danger of acting on the uncorroborated evidence of such witness. I am in agreement with that decision but in my view, the learned magistrate has in this instance, misdirected himself on this question. He seems to hold that PW2 and PW3's testimonies are not corroborative evidence relating to the giving of bribe by the accused to PW1. He also seems to think that the corroboration needed in this case must be positive evidence of an eye-witness to state the fact that the accused handed the envelope containing the money to PW1.

In series of decisions in our courts, it has been held that it would be sufficient corroboration if there is independent evidence of relevant circumstances connecting the accused with the crime

see *Public Prosecutor* v. *Datuk Harun Idris (No.2)*[2]. Thus corroborative evidence need not be direct. It is sufficient if it is merely circumstantial evidence of the accused's connection with the offence. PW2's and PW3's testimonies are such evidence.

On reading the learned magistrate's decision as a whole it appears that he was too engrossed with moral considerations and the motive of PW1. He has repeatedly stated in his decision that PW1's evidence was fraught with dubiousity, suspicion and ulterior motive because in his view, a junior officer should not launch an investigation against another officer senior in rank to him. With respect, this is a wrong view to hold. In law there is nothing preventing a police inspector to institute investigation into a crime under the Prevention of Corruption Act, 1961, even involving his senior officers, especially when he was under the direction of his OCCI. Neither the Act itself, the C.P.C. nor the Police Act has provision bearing this. It has often been said that moral consideration is not ours to decide. The court is only concerned with the administration of law and within that jurisdiction to dispense justice.

The learned magistrate does not also seem to consider the presumption of law arising from cases of this nature under section 14 of the Prevention of Corruption Act, though this was brought to his attention during submissions by both counsel. In the present case, there is sufficient evidence showing that the gratification has been paid by the accused to PW1. In law, the presumption under section 14 arises for the defence of the accused to be called. See *Public Prosecutor* v. *Ng Kee Tiak*[3].

The accused's defence was one of denial. He said that PW1 had asked him for a loan of $20,000.00 but he never gave any money to PW1. He alleged that PW1 trapped him in alleging this offence against him because he had refused to co-operate in PW1's investigation against another DEP. The learned magistrate believed in the truthfulness of the explanation given by the accused having regard to the accused's demeanour.

It is obvious that the learned magistrate did not weigh the accused's defence as laid down in *Public Prosecutor* v. *Yuvaraj*[4].

"The burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable."

A mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient.

A magistrate is, of course, entitled to believe a witness at a trial but a general references to the demeanour of witnesses without more, gives rise to suspicion that an attempt is being made to bolster up a verdict which is contrary not only to the weight of the evidence but to the probabilities and which could not be supported on a detailed examination of the evidence. See *R.* v. *Low Toh Cheng*[5]. As shown in this case, the reliance by the learned magistrate on the demeanour of the accused is misplaced having regard to other evidence before him which he should have considered. See *Yap Fook Yew & Anor.* v. *Public Prosecutor*[6].

Upon the whole evidence and his grounds of decision in my judgment the learned magistrate has obstinately blundered and misdirected himself on many aspects of the evidence before him which led him to reach a distorted conclusion as to produce a positive miscarriage of justice. In this event, I have to allow this appeal and to set aside his order of acquittal of the accused and to order a retrial of this case by a different magistrate.

*Order accordingly.*

Solicitors: *David Tiong & Michael Ong.*

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## ONG HEOK & ANOR. v. OOI BEE TAT & ORS.

**[O.C.J. (Gunn Chit Tuan J.) April 3 & 4, 1980]**
**[Penang – Civil Suit No. 66 of 1980]**

*Practice & Procedure – Writ of Summons – Variation of form used – Application to set aside for non-compliance under 0. 2 r. 3 – Waiver of right of unconditional appearance – Rules of the Supreme Court 1957, 0. 2 r. 3, 0. 12 r. 30, 0. 70 r. 1.*

*Practice & Procedure – Application for ex parte interim injunction – Affidavit in support of writ sworn one day before writ – Motion to set aside.*

*Company Law – Injunction to preserve property in status quo – Damages not adequate remedy – Injunction allowed.*